

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

UNITED THERAPEUTICS
CORPORATION,

Plaintiff,

v.

LIQUIDIA TECHNOLOGIES, INC.,

Defendant.

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Civil Action No. 23-975-RGA

ORDER

I had a Markman hearing on September 30th. The parties disputed the meaning of “a” and “the” in relation to “a patient,” “the patient,” “a maximum tolerated dose,” and three other terms (“a single administration event,” “the administering,” and “the single inhalation administration event”). (D.I. 123 at 5). The patent had partial lexicography: “It is noted that, as used herein and in the appended claims, the singular forms “a,” “an,” and “the” include plural referents unless the context clearly dictates otherwise.” (‘327 Patent at 6:15-17). I indicated that I would construe the terms as “one or more” but that I wanted to know where “the context clearly dictates otherwise,” and I wanted Plaintiff to tell me specifically where in the claims the context dictated otherwise.

The Court: All right. Well, when we're through today, I would like [Plaintiff] to point out to me -- I would like [Plaintiff] to write a letter that basically identifies in the 18 asserted claims every place where "a" does not mean one or more. All right?

Counsel for Plaintiff: We can do that, Your Honor.

(Markman Tr. at 8).

The Court: So I am going to construe it as being one or more. But I think the "unless the context dictates otherwise" leaves too much wiggle room in for the Plaintiff, which is the

reason why I want a letter where [Plaintiff says] for "a," "and," and "the," where the context clearly dictates otherwise, and when they have that, what the otherwise is.

Presumably from context, it's that it's singular.

....

The Court: [Y]ou can submit a letter that[,] for every claim other than [12 and] 13[,] states what it is. So that at the end of the day, the construction will not be "one or more unless the context dictates otherwise" because we'll know which ones the context dictates otherwise. So it will be fixed. Okay?

Counsel for Plaintiff: Understood. Thank you.

(Markman Tr. at 22).

I received a one-page letter from Plaintiff. There was only one paragraph that appeared to be an attempt to comply with my Order. Plaintiff wrote:

The terms "a" and "the" mean "one or more," except in the circumstance where the phrase "a patient" is applied to a single patient. In that circumstance, context clearly dictates that the subsequent phrase "the patient" means "*one* patient" consistent with the singular antecedent. Further, in that circumstance, "a maximum tolerated dose" would mean "*one* maximum tolerated dose" for that single patient. This understanding is supported by the claims and specification which provide clear context dictating that a POSA would determine a "maximum tolerated dose for the individual subject." '327 patent, 6:61-62; 6:42-43 ("Subject' and 'patient' may be used interchangeably").

(D.I. 133).

Plaintiff's response is not helpful. It seems to be intentionally opaque. I have a hard time understanding why Plaintiff thought its letter was responsive to what I was looking for.

My understanding of the patent's lexicography is that a claim might have "a" or "the" and it does not mean "one or more," the "a" or "the" simply means "one." But a particular usage of "a" or "the" in a claim does not sometimes mean "one or more" and other times mean "one."

I don't think this is the way claim construction works.¹

¹ If Plaintiff has some Federal Circuit support for the idea that a single instance of a term can mean one thing in one context and a different thing in another context, Plaintiff should bring the case or cases to my attention in the letter Plaintiff submits by October 10th.

Plaintiff is ORDERED to submit another letter, by no later than October 10, 2024, which includes the text of each asserted claim, and, for every time there is an “a,” “an,” or “the” in connection with one of the six terms identified in the Joint Claim Construction Brief, exactly one construction for that “a,” “an,” or “the.”

/s/ Richard G. Andrews

United States District Court